Ng Kian Wan v Choo Keng Hee & Anor

HIGH COURT (JOHOR BAHRU) — SUIT NO 23NCVC-115–07 OF 2012
ABDUL RAHMAN SEBLI J
19 APRIL 2013

Contract — Sale and purchase agreement — Agreements — Monies paid into clients' account of solicitor's firm — Solicitor took undertaking to refund if agreements not completed — Failure to complete agreement — Refusal of solicitor to refund monies — Allegation that transaction was sham and front to cover illegal money lending activity — Whether allegations proven — Whether solicitor bound by undertaking to refund monies

Evidence — Witness — Failure to call witness — Solicitor took undertaking to refund if agreements not completed — Failure to complete agreement — Refusal of solicitor to refund monies — Allegation that transaction was sham and front to cover illegal money lending activity — Whether monies was loaned by unlicensed moneylender — Alleged recipient of money lending activity not called — Whether s 114(g) of the Evidence Act 1950 could be invoked

The plaintiff and Zinma Housing Development Sdn Bhd ('Zinma') entered into four sales and purchase agreements ('SPA') for the sale of four pieces of land by Zinma to the plaintiff while the defendants acted as their common solicitors. The execution of the SPA was witnessed by the first defendant and a sum of RM400,000 was paid into the clients' account of the defendants' firm. The first two payments was RM100,000 and described as 'down payment' while the other two payments of equal sums were described as 'part payment of purchase price'. The defendants assured the plaintiff that the four properties were free from encumbrances and had given four separate written undertakings in respect of each of the properties. Despite the undertakings and in spite of their failure to complete the SPA, the defendants refused to refund the RM400,000 to the plaintiff as it was alleged that the land transaction was a sham and a front to cover an illegal money lending activity. The defendants further alleged that the four agreements were in truth a security for a loan of RM400,000 given by the plaintiff to one Robert Lee Kim Bo ('Robert Lee') and that they were merely acting as a medium to channel the said sum of RM400,000 to Robert Lee upon receipt of the same from the plaintiff. Thus, according to the defendants, the RM400,000 was not refundable by reason of illegality by virtue of s 15 of the Moneylenders Act 1951. The issues that arose for determination of the court was whether the defendants were bound by their undertaking to refund the sum of RM400,000 paid to them by the plaintiff

pursuant to a failed land transaction; and whether the RM400,000 was indeed a loan by an unlicensed moneylender.

Held, allowing the claim:

(1) Robert Lee who allegedly borrowed the money from the plaintiff was not called as a witness. There was therefore no way of knowing if there was any truth in the first defendant's allegation that the RM400,000 was a loan to Robert Lee. It remained a bare allegation. Not a single document was produced by the defendants to show that the money was meant as a loan, as opposed to the plaintiff who had produced all the necessary documents to prove that the RM400,000 was meant as down payment and part payment for the purchase of the four parcels of land. The defendants' failure to produce any documentary proof was perplexing as the sum involved was substantial and being lawyers themselves they were supposed to be wise to the workings of the law. The failure to call Robert Lee or any witness from Zinma must attract the inference under s 114(g) of the Evidence Act 1950. In all probability Robert Lee is a fictitious figure conjured up by the first defendant to deflect the plaintiff's claim (see paras 3–4).

(2) If indeed the RM400,000 was meant for Robert Lee, the defendants did not give any plausible explanation why there was the need for them to act as a 'medium' to channel the money to Robert Lee instead of paying the money directly to him. The first defendant's claim that it was the arrangement between the plaintiff and Robert Lee that the deposits be paid to him was hard to believe. The story was a concoction tailored to meet the indisputable evidence that the RM400,000 had been paid into the firm's client account (see para 3).

(3) The plaintiff was a credible witness. He came across as an honest and straightforward witness and the court accepted his evidence that he did not even know who Robert Lee was. He had indeed been a victim of the defendants' wrongful retention of the RM400,000. The question of him lending money to Robert Lee did not arise at all. The evidence before the court was that the money was paid by the plaintiff to the defendants' firm and the defendants admitted to collecting the same from the plaintiff. Further, there was no privity of contract between the plaintiff and Robert Lee (see para 5).

(4) The defendants must honour their undertaking to refund the RM400,000 to the plaintiff. The terms of the undertaking are clear and free from any material ambiguity. It was, pure and simple, an undertaking by the defendants to refund to the plaintiff the sum of RM400,000 in the event the four properties could not be transferred to the plaintiff due to their negligence or omissions. In this case, there was a clear breach of that undertaking by the defendants. There was total failure to complete the

sale and purchase transactions. Worse, the properties were either transferred to third parties or charged to financial institutions after the execution of the SPA instead of being transferred to the plaintiff (see para 7).

(5) There was evidence that the plaintiff through his solicitors had written to the defendants demanding for completion of the SPA. But to this day the defendants chose to ignore the demand. The defendants' total silence was uncharacteristic of experienced lawyers whose common stand was that the plaintiff was engaged in an illegal money lending transaction or that the plaintiff had been in breach of the agreements. Their failure to respond to the plaintiff's demand must be taken to mean that they had no valid reason for failing to complete the SPA (see para 13).

[Bahasa Malaysia summary

Plaintif dan Zinma Housing Development Sdn Bhd ('Zinma') memeterai empat perjanjian jual beli untuk jualan empat bidang tanah oleh Zinma kepada plaintif manakala defendan-defendan bertindak sebagai peguam am mereka. Pelaksanaan perjanjian jual beli tersebut telah disaksikan oleh defendan pertama dan jumlah RM400,000 telah dibayar ke dalam akaun klien firma defendan-defendan. Dua bayaran pertama adalah berjumlah RM100,000 dan dinamakan sebagai 'down payment' sementara dua bayaran yang lain dengan jumlah yang sama dinamakan sebagai 'part payment of purchase price'. Defendan-defendan memberi jaminan kepada plaintif bahawa keempat-empat hartanah bebas daripada halangan dan telah memberikan empat aku janji bertulis yang berasingan berkenaan dengan setiap hartanah. Biarpun aku janji dan kegagalan mereka untuk menyempurnakan PJB, defendan-defendan enggan menebus semula RM400,000 kepada plaintif memandangkan adalah didakwa bahawa transaksi tanah adalah satu penipuan dan penyamaran untuk menutup aktiviti pinjaman wang tidak sah. Defendan-defendan juga mendakwa bahawa keempat-empat perjanjian sebenarnya adalah jaminan bagi pinjaman sebanyak RM400,000 yang diberikan oleh plaintif kepada Robert Lee Kim Bo ('Robert Lee') dan bahawa mereka sekadar bertindak sebagai medium untuk menyalurkan jumlah RM400,000 kepada Robert Lee setelah penerimaan jumlah tersebut daripada plaintif. Justeru, menurut defendan-defendan, RM400,000 tidak boleh ditebus semula oleh sebab ketaksahan undang-undang menurut s 15 Akta Pemberi Pinjam Wang 1951. Isu-isu yang timbul untuk penentuan mahkamah adalah sama ada defendan-defendan terikat oleh aku janji mereka untuk menebus semula jumlah RM400,000 yang dibayar kepada mereka oleh plaintif menurut transaksi tanah yang gagal; dan sama ada RM400,000 sememangnya merupakan pinjaman oleh pemberipinjam wang yang tidak berlesen.

Diputuskan, membenarkan tuntutan:

(1) Robert Lee yang didakwa telah meminjam wang daripada plaintif tidak

dipanggil sebagai saksi. Oleh itu tidak terdapat cara untuk mengetahui sama ada benar dalam dakwaan defendan pertama bahawa RM400,000 adalah pinjaman kepada Robert Lee. Ia tetap sekadar dakwaan. Tiada sebarang dokumen yang dikemukakan oleh defendan-defendan untuk menunjukkan bahawa wang tersebut adalah dimaksudkan sebagai pinjaman, berlawanan dengan plaintif yang telah mengemukakan kesemua dokumen yang mencukupi untuk menunjukkan bahawa RM400,000 bermaksud untuk bayaran pendahuluan dan separuh bayaran untuk belian keempat-empat bidang tanah tersebut. Kegagalan defendan-defendan untuk mengemukakan apa-apa bukti dokumentari adalah membingungkan memandangkan jumlah yang terlibat adalah besar dan sebagai peguam mereka sepatutnya bijak tentang mekanisma undang-undang. Kegagalan untuk memanggil Robert Lee atau mana-mana saksi daripada Zinma menarik inferens di bawah s 114(g) Akta Keterangan 1950. Dalam kesemua kebarangkalian Robert Lee adalah watak palsu yang direka oleh defendan pertama untuk menepis tuntutan plaintif (lihat perenggan 3–4).

(2) Sekiranya benar RM400,000 dimaksudkan untuk Robert Lee, defendan-defendan tidak memberikan penerangan yang boleh dipercayai mengapa mereka perlu bertindak sebagai 'medium' untuk menyalurkan wang kepada Robert Lee sebaliknya membayar wang tersebut terus kepadanya. Tuntutan defendan pertama bahawa adalah menjadi perjanjian di antara plaintif dan Robert Lee bahawa deposit-deposit dibayar kepadanya adalah sukar untuk dipercayai. Cerita tersebut adalah rekaan untuk melawan keterangan yang tidak dapat dinafikan bahawa RM400,000 telah dibayar ke dalam akaun klien firma (lihat perenggan 3).

(3) Plaintif merupakan saksi yang boleh dipercayai. Dia kelihatan seperti saksi yang jujur dan berterus terang dan mahkamah menerima keterangannya bahawa dia tidak kenal siapakah Robert Lee. Dia sememangnya mangsa penahanan salah defenden-defenden terhadap RM400,000 tersebut. Persoalan tentang dia meminjamkan wang kepada Robert Lee tidak timbul langsung. Keterangan di hadapan mahkamah bahawa wang yang dibayar oleh plaintif kepada firma defendan-defendan dan defendan mengakui telah memungut yang sama daripada plaintif. Tambahan, tidak terdapat priviti kontrak di antara plaintif dan Robert Lee (lihat perenggan 5).

(4) Defendan-defendan hendaklah mematuhi aku janji mereka untuk menebus semula RM400,000 kepada plaintif. Terma-terma akujanji adalah jelas dan bebas daripada apa-apa material kekeliruan. Ia adalah jelas dan ringkas, akujanji oleh defendan-defendan untuk menebus semula jumlah RM400,000 dalam kejadian keempat-empat hartanah tidak boleh dipindahmilik kepada plaintif oleh kerana kecuaian atau apa

yang tidak dilakukan oleh mereka. Dalam kes ini, adalah jelas terdapat pelanggaran akujanji oleh defendan-defendan. Terdapat kegagalan keseluruhan untuk menyempurnakan transaksi jual beli. Lebih teruk lagi, hartanah-hartanah tersebut telah sama ada dipindahmilik kepada pihak ketiga atau dicagarkan kepada institut kewangan selepas pelaksanaan PJB daripada dipindah milik kepada plaintif (lihat perenggan 7).

(5) Terdapat keterangan bahawa plaintif melalui peguam-peguamnya telah menulis kepada defendan-defendan mengarahkan penyempurnaan PJB. Tetapi sehingga hari ini defendan-defendan memilih untuk mengendahkan tuntutan tersebut. Defendan-defendan yang mendiamkan diri bukanlah sifat peguam-peguam yang berpengalaman yang mempunyai pegangan yang sama bahawa plaintif telah menjalankan transaksi pinjaman wang yang salah di sisi undang-undang atau bahawa plaintif telah memungkiri perjanjian. Kegagalan mereka untuk bertindak kepada tuntutan plaintif hendaklah dianggap bermaksud bahawa mereka tidak mempunyai sebab yang kukuh mengapa mereka gagal untuk menyempurnakan PJB (lihat perenggan (lihat perenggan 13).]

Notes

For a case on agreement, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 6045.

For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3259–3277.

Cases referred to

ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd [2001] 3 MLJ 641, HC (refd)

Appoo s/o Krishnan v Ellamah d/o Ramasamy [1974] 2 MLJ 201 (refd)

Choe Kuan Him, Advocate & Solicitors, Re: T Damodaran v Choe Kuan Him [1975] 2 MLJ 274 (refd)

Madam Packiam Ramalingam v Badan Peguam Malaysia [2000] 1 MLJ 151; [1999] 4 CLJ 804, HC (refd)

Nasir Kenzin & Tan v Elegant Group Sdn Bhd [2008] MLJU 664; [2009] 1 CLJ 47, CA (refd)

Ong Thean Chye & Ors v Tiew Choy Chai & Anor [2011] 4 MLJ 616, CA (refd)

Sanjung Selamat Sdn Bhd v CL Chin & Associates & Anor (Part 4) [2007] 1 MLJ 570; [2007] 7 CLJ 144, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Moneylenders Act 1951 s 15

KM Ong (Lee & Co) for the plaintiff.
George Neo (HS Gun with him) (Yeo, Tan, Hoon & Tee) for the defendants.

Abdul Rahman Sebli J:

[1] The question for determination in this action is whether the defendants, who are brothers cum partners in the legal firm of Messrs KH Choo & Co are bound by their undertaking to refund the sum of RM400,000 paid to them by the plaintiff pursuant to a failed land transaction. The facts giving rise to this claim are as follows. The plaintiff and Zinma Housing Development Sdn Bhd ('Zinma') entered into four sale and purchase agreements for the sale of four pieces of land by Zinma to the plaintiff. The defendants acted as their common solicitors in the transactions. The execution of the agreements was witnessed by the first defendant and a sum of RM400,000 had been paid into the clients' account of Messrs KH Choo & Co. The first two payments amounting to RM100,000 each were described as 'down payment' while the other two payments of equal sums were described as 'part payment of purchase price'. The defendants assured the plaintiff that the four properties were free from encumbrances and had given four separate written undertakings in respect of each of the properties. The wordings of the undertakings are couched in identical terms, one of which is reproduced below:

> We refer to the purchase of the aforesaid property and confirm that the said property is free from any encumbrances and is transferable to you or your nominee and you may now pay the down payment of RM100,000.00 to us for our onward transmission to the Vendor. The original title deed of the said property is now in our possession. *We undertake to refund to you the said sum of RM100,000.00 in the event that the said property cannot be transferred to you or your nominee due to our negligence or omission in this transaction.*
>
> We shall proceed to lodge the caveat against the said property to protect your interest. (Emphasis added.)

[2] At the trial only the first defendant gave evidence. Despite the undertakings and in spite of their failure to complete the sale and purchase agreements the defendants refused to refund the RM400,000 to the plaintiff. Their excuse is that the land transaction was a sham and a front to cover an illegal money lending activity. Specifically the defendants alleged that the four agreements were in truth a security for a loan of RM400,000 given by the plaintiff to one Robert Lee Kim Bo ('Robert Lee') and that they were merely acting as a medium to channel the said sum of RM400,000 to Robert Lee upon receipt of the same from the plaintiff. Thus, according to the defendants the RM400,000 was not refundable by reason of illegality, citing s 15 of the Moneylenders Act 1951. Reliance was also placed on *Ong Thean Chye & Ors v*

Tiew Choy Chai & Anor [2011] 4 MLJ 616; *ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd* [2001] 3 MLJ 641; *Appoo s/o Krishnan v Ellamah d/o Ramasamy* [1974] 2 MLJ 201 for the proposition that the courts will not enforce contracts which are tainted with illegality.

[3] The question is whether the RM400,000 was a loan by an unlicensed moneylender as alleged by the defendants. This is the main plank of the defendants' case. Their defence must stand or fall within the four walls of this allegation. In this regard the first point to note is that Robert Lee who allegedly borrowed the money from the plaintiff was not called as a witness. There is therefore no way of knowing if there is any truth in the first defendant's allegation that the RM400,000 was a loan to Robert Lee. It remains a bare allegation. Not a single document was produced by the defendants to show that the money was meant as a loan, as opposed to the plaintiff who had produced all the necessary documents to prove that the RM400,000 was meant as down payment and part payment for the purchase of the four parcels of land. The defendants' failure to produce any documentary proof is perplexing to say the least as the sum involved is substantial and being lawyers themselves they are supposed to be wise to the workings of the law. Besides, if indeed the RM400,000 was meant for Robert Lee, the defendants have not given any plausible explanation why there was the need for them to act as a 'medium' to channel the money to Robert Lee instead of paying the money directly to him. The first defendant's claim that it was the arrangement between the plaintiff and Robert Lee that the deposits be paid to him is hard to believe. I am inclined to believe that the story is a concoction tailored to meet the indisputable evidence that the RM400,000 had been paid into the firm's client account.

[4] Robert Lee was purported to be one of the directors of Zinma yet not a single witness from Zinma was called to support the assertion and to prove that the RM400,000 was a loan given to Robert Lee. The failure to call Robert Lee or any witness from Zinma must in my view attract the inference under s 114(g) of the Evidence Act 1950. Even if the adverse inference cannot be drawn against the defendants on the ground that there was no 'withholding' of evidence as contended by counsel for the defendants, the fact remains that without the evidence of Robert Lee the defendants' claim that the RM400,000 was a loan to Robert Lee remains a bare and unsubstantiated claim. The first defendant's explanation for their failure to call Robert Lee was that Robert Lee 'ran away from the plaintiff'. I do not accept this explanation. In all probability Robert Lee is a fictitious figure conjured up by the first defendant to deflect the plaintiff's claim.

[5] As for the credibility of the plaintiff as a witness he came across to me as an honest and straightforward witness and I accept his evidence that he does not even know who Robert Lee is. Having seen him giving evidence I get the

distinct impression that he had indeed been a victim of the defendants' wrongful retention of the RM400,000. The question of him lending money to Robert Lee does not arise at all. To my mind the allegation is nothing more than a flimsy excuse not to refund the RM400,000 to the plaintiff. In any case not a shred of evidence was produced by the defendants to show that the RM400,000 had been paid over to Robert Lee, if indeed the money was meant for Robert Lee as alleged. The evidence before the court is that the money was paid by the plaintiff to the defendants' firm and the defendants have admitted collecting the same from the plaintiff. Further, there is no privity of contract between the plaintiff and Robert Lee even if he existed and the defendants have produced no proof of any retainer to act for Robert Lee. What is clear is that the defendants acted as common solicitors for the plaintiff and Zinma.

[6] The defendants must honour their undertaking to refund the RM400,000 to the plaintiff. In *Black's Law Dictionary* an undertaking is defined to mean:

> A promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply a consideration. In a somewhat special sense, a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party. A promise or security in any form.

[7] The terms of the undertaking are clear and free from any material ambiguity. It was, pure and simple, an undertaking by the defendants to refund to the plaintiff the sum of RM400,000 in the event the four properties could not be transferred to the plaintiff due to their negligence or omissions. In this case there was a clear breach of that undertaking by the defendants. There was total failure to complete the sale and purchase transactions. Worse, the properties were either transferred to third parties or charged to financial institutions after the execution of the sale and purchase agreements instead of being transferred to the plaintiff.

[8] For property held under HS(D) 124321 PTD 19115 the defendants allowed the land to be transferred to one Chan Kam Hoh on 22 January 2003 and charged to Bumiputra Commerce Bank on the same date, although the enforcement period of the sale and purchase agreement had not lapsed.

[9] For property held under HS(D) 124817 PTD 19611 Zinma was allowed to charge the land to United Overseas Bank ('UOB') on 29 October 2001, after the sale and purchase agreement was signed and it was the first defendant

himself who withdrew the private caveat on 4 October 2001 after entering it on 30 May 2001. The withdrawal obviously was to facilitate the creation of the charge in favour of UOB.

[10] For property held under HS(D) 124850 the defendants confirmed to the plaintiff vide letter dated 26 May 2004 that the completion date of the transaction had been extended for six months from 29 May 2004. This was misleading because the land had by then been transferred from Zinma to one Lee Chey Nar on 28 January 2002 to the defendants' knowledge.

[11] For property held under HS(D) 124851, the defendants allowed the transfer of the land from Zinma to one Wee Sah Kee on 13 December 2001, about four months after the sale and purchase agreement was executed. The defendants failed to enter a private caveat to protect the plaintiff's interest in the property.

[12] The defendants alleged that their failure to complete the transactions was due to the plaintiff's own breach of the agreements and not due to their negligence or omissions. This cannot be true. If indeed there had been any default by the plaintiff, the defendants, being the common solicitors for the contracting parties would have taken action to annul or terminate the agreements, but they did not. The first defendant alleged intimidation, including threats by gangsters in an attempt by the plaintiff to force them to execute the sale and purchase agreements but strangely no police report was lodged and no explanation was given for such failure. That would have been the first thing a lawyer would do in the ordinary course of events. I find no truth in the allegation. In any event the question is not whether they were threatened by the plaintiff to execute the sale and purchase agreements but whether they are bound by their undertaking to refund the RM400,000 to the plaintiff.

[13] There is evidence that the plaintiff through his solicitors had written to the defendants vide letter dated 26 January 2004 demanding for completion of the sale and purchase agreements. But to this day the defendants chose to ignore the demand. The defendants' total silence is uncharacteristic of experienced lawyers whose common stand is that the plaintiff was engaged in an illegal money lending transaction or that the plaintiff had been in breach of the agreements. Their failure to respond to the plaintiff's demand must be taken to mean that they had no valid reason for failing to complete the sale and purchase agreements.

[14] Once an undertaking has been given, the full rigours of the law will be brought to bear upon it: *Madam Packiam Ramalingam v Badan Peguam Malaysia* [2000] 1 MLJ 151; [1999] 4 CLJ 804. The seriousness of the undertaking cannot be underestimated, especially when it was given by a

member of the legal profession: *Nasir Kenzin & Tan v Elegant Group Sdn Bhd* [2008] MLJU 664; [2009] 1 CLJ 47. A solicitor's undertaking is a special undertaking and goes towards his integrity, his profession and his responsibility as an officer of the court: *Sanjung Selamat Sdn Bhd v CL Chin & Associates & Anor* [2007] 1 MLJ 570; [2007] 7 CLJ 144. The standard required is so high that the courts have allowed only one defence, that of mistake: *Re Choe Kuan Him, Advocate and Solicitor; T Damodaran v Choe Kuan Him* [1975] 2 MLJ 274. In the present action it is not the defendants' case that the four undertakings were given by mistake.

[15] As for the issue of limitation raised by the defendants I am with counsel for the plaintiff that the defendants' contention is untenable as the action was initially commenced by way of originating summons in OS No MT4-24–2006 of 2008 and filed sometime in June 2008. The conversion to the present writ action was merely a continuation of the action and not an entirely new cause of action. Time must therefore be measured from the date of the filing of the originating summons and not from the time of conversion to the writ action.

[16] In the circumstances and for reasons aforesaid I am satisfied that the plaintiff has proved his case on the balance of probability. Judgment is therefore entered for the plaintiff in terms of the statement of claim.

Claim allowed.

Reported by Afiq Mohamad Noor